Supreme Court, U.S.
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NO. _____

IN THE

Supreme Court of the United States

Arthur Hollander

Petitioner.

--- v ---

American Cyanamid Company

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

Pro Se Petitioner,

ARTHUR HOLLANDER
39 Pond View Drive
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36 pp

QUESTIONS PRESENTED

1. Whether, in the interest of uniform justice, when two cases petition the Supreme Court in the *same* court term, raising the *same* issues, and judged by the *same* decisional law, and one case is reversed on the basis that the decisional law was misconceived -- is the other case entitled to this *same* justice by having its judgment reversed, under this Court's equitable justice doctrines of *Hazel-Atlas v. Hartford Empire* and *U.S. v. Ohio Power*, or FRCP - Rule 60(b)(5)?

2. Whether the Supreme Court's abrogation of the decisional law (*Fisher v. Vassar College*) is sufficient grounds for Relief from Judgment under Rule 60(b)(5), or is this relief at the discretion of the court that established this decisional law and which stated *Reeves v. Sanderson Plumbing* is "wholly compatible and harmonious" with *Fisher*, suggesting "the Supreme Court inaccurately read *Fisher*", etc.?

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2. To Resolve Whether the Second Circuit is Continuing Its Conflict With Applicable Decisions of This Court By Not Giving Proper Weight To Evidence Of Dishonesty And By Maintaining: That *Fisher* and *Reeves* are "Wholly Compatible and Harmonious"; Suggesting That The Supreme Court "Inaccurately Read *Fisher*;" etc. 10

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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner Arthur Hollander prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit on the issue of Uniform and Equitable Justice in Title VII and Age Discrimination Cases.

OPINIONS BELOW

The Mandate of the Court of Appeals affirming the judgment of the District Court's denial of Rule 60(b)(5) Relief, on May 24, 2001, is reproduced in the Appendix to this petition at 1a.

The Endorsement of the District Court in denying Rule 60(b)(5) Relief, on December 28, 2000, is reproduced in the Appendix to this petition at 2a.

The opinion of the Court of Appeals reversing a prior summary judgment, on January 30, 1990 [Age Discrimination ruling] is reported at 895 F.2d 80, and relevant sections are reproduced in the Appendix to this petition at 3a.

The opinion and judgment of the District Court, on remand, in granting a summary judgment in favor of the defendant on the Age Discrimination claim is reported at 999 F.Supp. 252, on March 9, 1998, and relevant sections are reproduced in the Appendix to this petition at 6a.

The opinion of the Court of Appeals affirming the judgment of the District Court is reported at 172 F.3d 192, on March 29, 1999, and relevant sections are reproduced in the

Appendix to this petition at 18a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on May 24, 2001. The jurisdictions of this Court is conferred by 28 U.S.C. Sec. 1254 (1).

STATUTES & DOCTRINES INVOLVED

This case invokes the Supreme Court's Equal Justice Under Law doctrine, and the Constitution's Fourteenth Amendment "Due Process" provision. In addition, the Supreme Court's Rule 10.1(c) of uniform and equitable justice of applying applicable decisions of this Court in the Discrimination in Employment Act (29 U.S.C. Sec. 623 (a) cases, as well as Federal Rules of Civil Procedure 56 and 60, and Federal Rules of Evidence 702. Relevant portions of these statutes appear in the Appendix at 15a - 16a.

STATEMENT OF THE CASE

Petitioner Arthur Hollander ("Hollander") sued American Cyanamid Company ("Cyanamid") where he had been employed in a managerial position for fifteen years, for violation of the Age Discrimination in Employment Act (ADEA) when he was discharged in 1984 at age 58. The district court granted summary judgment to Cyanamid in 1989. Hollander appealed that judgment to the circuit court which reversed the district court, granting Hollander the right to company-wide discovery to prove his case.

In reversing the district court, Judge Oakes, ruling in 1990 for the Second Circuit, prior to the issues now before this Court, stated concerning the new discovery the court authorized:

> "It is well-settled that an individual disparate treatment plaintiff may use statistical evidence regarding an employer's general practices at the pretext stage to help rebut the employer's purported non-discriminatory explanation ... This case turns on the sincerity of American Cyanamid's claim that Hollander's abrasive personality justified his discharge ... and the inability of a company supervisor to detail instances in which such problems impeded productivity ... So long as the plaintiff can present "solid circumstantial evidence" supporting his case, he should have the opportunity to prove his case at trial." (4a) *Hollander*, 895 F.3d 84-85.

It was on the above premise that Hollander proceeded by adducing a variety of evidence (7a) which not only belied Cyanamid's ostensible reason for Hollander's termination ("interpersonal problems so severe that they impeded the success of projects"), but also revealed a pattern of dishonest behavior within Cyanamid's involuntary terminations of 1,700 similarly situated older managers without a reduction-in force program.

Upon remand, the district court appointed two Special Masters, one subsequently appointed a U.S.D.J. [Judge Arterton], to convene a settlement conference (1990) in which they found sufficient evidence of dishonest behavior, inferring discrimination, to recommend a six-figure settlement award for Hollander ... and then reconvened a second conference in 1994 (after some company-wide discovery had been produced) to "triple" their previous award (both rejected by Cyanamid).

In 1998, in ruling on a motion for summary judgment, the District Court acknowledged that Hollander had presented strong evidence of dishonest behavior (affidavits, documented

evidence, discrediting Cyanamid's witnesses' deposition testimony, and having a good track record of annual: salary increases; bonuses; stock options; plus promotions, stating:

> "This court agrees with plaintiff that his evidence may in fact raise some doubt as to whether defendant's articulated reason for discharging him is believable." *Hollander*, 999 F.Supp. at 258 (7a).

The court then relied upon *Fisher v. Vassar College*, 114 F.3d 1332 (2d Cir. 1997) (en banc) case to declare that the evidence of pretext against Cyanamid was insufficient as a matter of [*Fisher*] law to survive summary judgment, stating:

> "Accordingly, plaintiff may prevail only if he shows that Cyanamid's proffered reasons are a pretext for discrimination, 'either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction, or both' " id at 1339 (9a).

Upon review by the appeals court, the applied standard was made still clearer as the appeals court declared that it didn't matter if Cyanamid was dishonest about why Hollander was terminated:

> "We need not decide whether Hollander offered enough evidence to establish that Cyanamid used his allegedly poor interpersonal skills as a pretext for its true reason for terminating him. Assuming arguendo that he did, this is far from the end of the matter, for to survive summary judgment Hollander had to show not only pretext, but also *either use of a pretext that itself implies a discriminatory stereotype, or use of pretext to hide age discrimination.* This he did not do." 172 F.3d at 200 (12a) (Italics in original).

The appeals court, as did the district court, then

referred to *Fisher* for support of this requirement (12a - 13a). This is the same requirement that *Reeves* ruled as a "misconceived evidentiary burden."

Hollander petitioned the Supreme Court on these issues in 99-339 and was denied certiorari on November 1, 1999. The following week, Reeves 99-536 was granted certiorari, on November 8, 1999, on these same issues, and Hollander's petition for a rehearing to join the two cases was denied on January 19, 2000. Upon seeing his position vindicated by the ruling in *Reeves*, on June 12, 2000, Hollander asked the Supreme Court to also rule on his case in light of *Reeves*. This was denied on October 10, 2000, presumably on the basis that the Supreme Court, having 10,000+ requests per term, relies on the courts below to administer its doctrines under uniform and equitable justice by applying the rules established by this Court.

Hollander sought relief in the District Court under Rule 60(b)(5), as the *Fisher* decisional law upon which his case was adjudicated, had been abrogated as a "misconceived evidentiary burden" and based on the "intervening and compelling circumstances" of the *Reeves* decision. The District Court denied this relief from summary judgment by citing caselaw which states that a lower court cannot reverse a higher court's ruling (prior panel affirmed the district court's ruling) (2a).

Hollander then appealed to the Second Circuit which issued a mandate (1a) granting Cyanamid's Motion to Dismiss. In arguing for dismissal, Cyanamid quoted panels within the Second Circuit that *Reeves* did not change and had no effect on *Fisher* caselaw. (infra p. 11) Apparently, the Hollander panel [01-7119] did not accept the fact that the *Fisher* decisional law was abrogated, and on this basis ruled

the appeal to be frivilous.

Based on the confusion and the lack of details as to why the district and appeals courts denied Hollander's Relief from Summary Judgment, on "intervening and compelling" circumstances of *Reeves* abrogating the decisional law used in *Hollander,* Hollander petitions this Court, in the interests of justice, to grant certiorari for the following reasons.

REASONS FOR GRANTING THE WRIT

1. To Resolve The Special Circumstances Under Which: (a) Rule 60(b)(5) Can Be Applied and/or (b) The Interests of Justice Doctrines (*Hazel Atlas v Hartford Empire* and *U.S. v. Ohio Power Co.*) To Ensure That Principles of Uniform and Equitable Justice Are Maintained In All Circuit Courts of Appeal.

Both, Petitioner Hollander and Reeves petitioned this Court in the *same* court-term, on the *same* issues of dishonest behavior, and judged by the *same Fisher v. Vassar College*, 114 F.3d 1332, 1339 (2d Cir. 1997) en banc decisional law ("plaintiff must introduce sufficient evidence for a jury to find both that the employer's reason was false and that real reason was discrimination") *Reeves*, 530 U.S. 140, 120 S.Ct. 2105. The *Reeves* Court ruled this a "misconceived evidentiary burden borne by plaintiffs who attempt to prove intentional discrimination through indirect evidence." *Reeves,* 530 U.S. 146, 120 S.Ct. 2108. "It suffices to say that, because a prima facie case and sufficient evidence to reject the employer's explanation may permit a finding of liability, -- the Court of Appeals erred in proceeding from the premise that a plaintiff must always introduce additional, independent

evidence of discrimination," *Reeves*, 530 U.S. 149, 120 S.Ct. 2109. This is precisely what occurred in *Hollander*. Under these circumstances this Court held "no broader holding is necessary to support reversal" *Reeves*, 530 U.S. 154, 120 S.Ct. 2112. (emphasis added above).

A panel of the Second Circuit further confirmed that *Hollander* had established a prima facie case and sufficient evidence of pretext, and then was required to provide additional, independent evidence of discrimination to survive summary judgment. The *Schnabel* panel stated:

> "In examining the impact of *Reeves* on our precedents, we conclude that *Reeves* prevents courts from imposing a *per se* rule requiring in all instances that an ADEA claimant offer more than a prima facie case and evidence of pretext. Thus, to the extent that *Woroski* and *Hollander* imposed such a rule, they no longer may be followed." *Schnabel*, 232 F.3d at 90.

Since Hollander had met the same standard that this Court set forth in *Reeves*, he should be entitled to the same justice Reeves received. Furthermore, there was nothing in the record that would have supported this Court's "presumably rare" exception provision (*Reeves*, 530 U.S. 148, 120 S.Ct. 2109), as Hollander controverted all of Cyanamid's evidence with affidavits, documented evidence, discredited deposition testimony (see *Hollander*, 999 F.Supp. at 258) (7a), plus submitting an expert's statistical report (Rule 702)[1] concluding "To an extremely high degree of statistical certainty, age had to be the determining factor in the

---

[1] A qualified expert should have the opportunity during direct and cross examination to clarify his/her findings, to assist the trier of fact in understanding the issue(s), rather than a judge making a misconceived determination from a written report.

'job eliminated' terminations [hundreds of managers]" and, an EEOC report of 97 claims of age discrimination. Cyanamid had terminated 1,700 "protected-age" managers, without a reduction-in-force program. In addition, two court appointed Special Masters on two occasions (1990 and 1994) found sufficient evidence of defendant's liability of discrimination to twice recommend a settlement award for Hollander (tripling the award in 1994). All of the above was discounted as "insufficient as a matter of [*Fisher*] law" as Hollander had not provided additional, independent evidence of discrimination.

Hollander considered *Reeves* as "intervening and compelling circumstances" to move the courts below for relief from summary judgment in accordance with F.R.C.P. Rule 60(b)(5) ["a prior judgment upon which it is based has been reversed or otherwise vacated"] as *Reeves*, 530 U.S. 133, 120 S.Ct. 2097 stated that the Second Circuit's decisional law had been abrogated.

The courts below are empowered to provide relief, under Rule 60(b)(5), when the decisional law used in adjudicating a case has been abrogated by a higher court. This Rule has no fixed time limit, other than the motion be made in a "reasonable time", as stated in Moore's Federal Practice, Vol. 7, 2d Edition, R.60 (1995):

> "Because of the basis for relief under clause (5), the Rule quite naturally provides that the only time limitation under a motion for relief under clause (5) is that it be made within a 'reasonable time.' ... Due to the remedial nature of Rule 60(b) and to the grounds for relief under clause (5), the reasonable time limitation should be applied to the end that substantial justice is done. This means that a movant should be given ample time under all circumstances within which to make his motion. But

if the movant has not acted within reasonable diligence his motion may properly be denied." id. at p.60-243.

In pursuit of uniform and equitable justice, as other similar plaintiffs have received in other circuits, Hollander diligently pursued justice with timely motions, appeals, and petitions. Now that the Supreme Court has spoken in *Reeves*, Hollander should be entitled to same justice as Reeves received. This Court has established several doctrines to support the principle of "uniform and equitable justice under law":

"If Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of injustice which, in certain instances, are deemed sufficiently gross to demand a departure from the rigid adherence to the doctrine of *res judicata*." *Hazel Atlas Glass v. Hartford Empire*, 322 U.S. 238, 244 (1944); *United States v. Chris W. Beggerly*, 524 U.S. 38 (1998) ... and supported by:

"the finality of litigation must yield where the interests of justice would make unfair the strict application of our rules." *United States v. Ohio Power Co.*, 353 U.S. 98,99 (1957); *Gondeck v. Pan American World Airways*, 370 U.S. 25, 27 (1965).

Ohio Power and Gondeck were initially denied certiorari and denied a rehearing and based on an intervening Supreme Court ruling in another case, this Court years later granted certiorari to Ohio Power and Gondeck by reversing their prior rulings. Beggerly, a similar type case, had his prior ruling reversed after twelve years .

The Second Circuit's precedent on Rule 60(b) is appropriate to grant Hollander relief in the same manner it

granted Tarkington relief. See, *Tarkington v. United States Steamship Lines Co.*, 222 F.2d 358 (2d Cir., 1955):

> " ... a prior judgment in a separate action may be vacated when a subsequent case overrules the rationale which formed the basis for the judgment ... the Supreme Court in *Alaska v. Steamship Co. v. Petterson*, 347 U.S. 396 (1954) modified the rule upon which the original verdict had been based ... Since the doctrine of the *Petterson* case conflicts with the cases on which the trial judge relied in directing its verdict, the trial judge should have treated plaintiff's motion as a motion under F.R.C.P. Rule 60(b) to correct a mistake of the court." id. 222 F.2d at 360.

Substituting Reeves for Petterson (Supreme Court cases) and Hollander for Tarkington (Second Circuit cases). the situation described above would equally apply the use of Rule 60(b) -- to correct a mistake of the court in Hollander as the Supreme Court corrected a mistake of the Fifth Circuit Court in Reeves in misconceiving the decisional law.

2. To Resolve Whether the Second Circuit is Continuing Its Conflict With Applicable Decisions of This Court By Not Giving Proper Weight To Evidence Of Dishonesty And By Maintaining: That *Fisher* and *Reeves* are "Wholly Compatible and Harmonious"; Suggesting That the Supreme Court "Inaccurately Read *Fisher*;" etc.

The significance of this reason is (1) to prevent the Second Circuit from continuing its residual split among the circuits which *Reeves* sought to resolve and (2) to align the Second Circuit with the other circuits, as the panels within it are not willing to admit that *Reeves* impacted the *Fisher*

decisional law in any manner by stating:

> "It is arguable the Supreme Court's reading of *Fisher* was inaccurate ... We read *Fisher* as consonant with *Reeves* ...", *Schnabel v. Abramson*, 232 F.3d at 89, n.5 --- "We conclude that the Supreme Court's reasoning in *Reeves* is wholly compatible and harmonious with our reasoning in *Fisher* ... There is no inconsistency between the two rulings." *James v. N.Y.R.A.*, 133 F.3d at 155 --- "Our Circuit does not read *Reeves* as favorable to Title VII plaintiffs as the Fourth and Fifth Circuits [previously had used the *Fisher* decisional law]," *Zimmermann v. Assoc. First*, 252 F.3d at 382 --- and "We conclude that even assuming that a jury could believe that by itself [the reason was false] -- the evidence presented by Slattery is not enough to permit [a finding] 'that the real reason he was fired was his age." *Slattery v. Swiss Re*, 248 F.3d at 94 (reverting to the *Fisher* decisional law, i.e, requiring a showing that the real reason was discrimination).

A. The Substantial Difference Between *Reeves* and *Fisher*

Contrary to the state-of-mind of the Second Circuit judges that *Reeves* had no impact on *Fisher* (supra p. 10, 11), this Court's unanimous ruling indicated just the opposite: (a) it abrogated the *Fisher* decisional law by ruling it was a "misconceived law", supra p.7; (b) *Fisher* "required that a plaintiff must always provide additional, independent evidence of discrimination", supra p.7; (c) *Fisher* relied on a showing, in addition to pretext, *the use of pretext to hide age discrimination*, supra p.4; (d) Whereas, *Reeves* approaches (b) and (c) on the general principle of evidence law that a showing of dishonest behavior [lying by the employer]

constitutes "affirmative evidence of guilt" for a jury to determine the issue of "intentional discrimination;" and (e) *Fisher*, by requiring a showing that the "real reason was discrimination", in effect, allows the judges to make the "Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts in granting summary judgment --- whereas *Reeves* at 530 U.S. 150, 151, 120 S.Ct. 2110 states "these are jury functions, not those of a judge." citing: *Anderson v. Liberty Lobby*, 477 U.S. 242, 255, 106 S.Ct. 2505.

B. Second Circuit Panel's Contradictory Statements

The panels of the Second Circuit while arguing that nothing has changed in *Fisher* (which has been demonstrated above as incorrect, (supra pp. 11,12) contradicts their arguments by the opinions in *Schnabel*, 232 F.3d 83 stating:

> (i) "In examining the impact of *Reeves* on our precedents, we conclude that *Reeves* prevents courts from imposing a per se rule requiring *in all instances* that an ADEA claimant offer more than a prima facie case and evidence of pretext. Thus, to the extent that *Woroski* and *Hollander* imposed such a rule, they no longer may be followed," id. at 90, and ...
>
> (ii) "To the extent that *Woroski*, *Hollander*, and *Fisher* require a plaintiff, in some cases, to do more than establish a prima facie case and present pretext evidence in order to survive a motion for summary judgment, we must decide whether those cases are still good law in the wake of the Supreme Court's decision in *Reeves*." id. at 89. (emphasis added above).

This shows that the *Fisher* per se rule "requiring in all instances that an ADEA claimant offer more than a prima

facie case and evidence of pretext, was imposed in *Hollander*. This Court ruled that the Fifth Circuit in Reeves using this same *per se* decisional law erred in proceeding from the premise that a plaintiff must always introduce additional, independent evidence of discrimination" , 530 U.S. 149, 120 S.Ct. 2109. The fact that the *Fisher* decisional law was ruled erroneous (supra p.6) forms the "heart" of Hollander's claim for relief from summary judgment in accordance with Justice Ginsburg's concurring opinion in *Reeves*, stating:

> "This Court today holds that an employment discrimination plaintiff may survive judgment as a matter of law by submitting two categories of evidence: first, evidence establishing a "prima facie case." as that term is used in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973); and second, evidence from which a rational fact-finder could conclude that the employer's proffered explanation of its actions was false. Because the Court of Appeals in this case plainly, and erroneously, required the plaintiff to offer some evidence beyond those two categories, no broader holding is necessary to support reversal." (emphasis added). *Reeves*, 530 U.S. 154, 120 S.Ct. 2112.

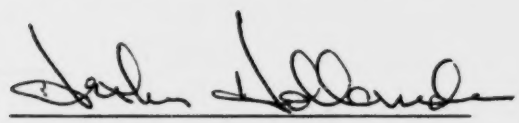
Therefore, in the interests of justice, and under the "intervening and compelling circumstances" of *Reeves*, Hollander should be entitled to receive the same justice that Reeves received by having his judgment reversed, and to allow a jury to make the determination of intentional discrimination. In addition, the fact that the panels within the Second Circuit cannot decide "whether those cases [*Woroski, Hollander* and *Fisher*] are still good law in the wake of .... *Reeves*" (supra p.12 at ii) creates suspicion as to why the *Hollander* court ruled his appeal as frivolous, denying him due process of law (jury trial) in light of *Reeves*.

CONCLUSION

This Court should grant the Writ of Certiorari to the Second Circuit Court of Appeals to hear and decide the important issues posed.

Respectfully submitted,

ARTHUR HOLLANDER, pro se



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Dated: Merrimack, N.H.
August 13, 2001

APPENDIX

MANDATE

D.Conn. 85-cv-481 (WWE)

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the 24th day of May two thousand and one [May 24, 2001].

PRESENT: Hon. Dennis Jacobs, Hon. Pierre N. Leval, Circuit Judges, Hon. J. Garvin Murtha, District Judge

Arthur Hollander, Plaintiff- Appellant,

v. **01-7119**

American Cyanamid Co., Defendant- Appellee

"Appellee has filed a motion to dismiss the appeal as frivolous and for an order preventing future filings in this action. Upon due consideration, it is ORDERED that the appellee's motion is granted, insofar as it requests that the appeal be dismissed, and the appeal is dismissed as frivolous. It is further ORDERED that the appellee's motion is denied, insofar as it requests an order from this Court preventing future filings in this action, because the order is unnecessary in light of the district court's order. The Appellee's motion for expedited consideration of the motion to dismiss the appeal is denied as moot."

FOR THE COURT

Roseann B. MacKechnie, Clerk

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

ARTHUR HOLLANDER, **CIVIL ACTION**

Plaintiff **B-85-481 (WWE)**

v.

AMERICAN CYANAMID CO.,

Defendant. **November 7, 2000**

MOTION - RELIEF FROM SUMMARY JUDGMENT

Plaintiff, Arthur Hollander moves this court for relief under Fed. R. Civ. Proc. Rule 60(b)(5 in accordance to the rule of law as contained in the attached Memorandum of Law

---

ENDORSEMENT:

"Plaintiff's Motion is DENIED. This Court's ruling was affirmed in Hollander v. American Cyanamid Co., 172 F.3d 192 (2d Cir. 1999). This case is closed. The Court will not accept further pleading under this docket number. Furthermore, the plaintiff has not shown cause why this Court should grant relief pursuant to Rule 60. See United States v. Int'l Bhd. of Teamsters, 51 F.Supp. 2d 314, 318 (S.D.N.Y. 1999)."

So Ordered.

Warren W. Eginton

S.U.S.J.

Dated: December 28, 2000

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

(Argued: Sept. 27, 1989 Decided: Jan. 30, 1990)
Docket No. 89-7402
cite: 895 F.2d 80, 84-85 (2d Cir. 1990)

Arthur Hollander,

Plaintiff - Appellee., pro se

- -v. --

American Cyanamid Company

Defendant - Appellant

Before: OAKES, Chief Judge; PIERCE and RUBIN,* Circuit Judges

OAKES, Chief Judge:

Arthur Hollander appeals from a summary judgment of the United States District Court for the District of Connecticut, Warren W. Eginton, Judge, granting Hollander's former employer, American Cyanamid Company, summary judgment on Hollander's claims under the Age Discrimination in Employment Act, 29 U.S.C. §§ 623 et seq. (1982 & Supp. V 1987), and dismissing his Connecticut state law claim for tortious interference with a business expectancy. We affirm in part, vacate in part, and remand.

* Of the U. S. Court of Appeals for the Fifth Cir. sitting by designation.

We find the district court erred in refusing to compel American Cyanamid to answer Hollander's interrogatory. Hollander's discovery request sought information regarding the termination of similarly situated persons, management personnel over forty years old, working for American Cyanamid. Although the request goes beyond the narrow confines of the Davis & Geck Danbury facility in which Hollander worked and pursues facts pertaining to American Cyanamid's employment practices more generally, it is relevant to Hollander's case.

It is well-settled that an individual disparate treatment plaintiff may use statistical evidence regarding an employer's general practices at the pretext stage to help rebut the employer's purported non-discriminatory explanation. *See, e.g., McDonnell Douglas,* 411 U.S. at 804-05, 93 S.Ct. at 1825-26; *Lieberman v. Gant,* 630 F.2d 60, 68-69 (2d Cir. 1980); *Logan v. St. Luke's-Roosevelt Hosp. Center,* 636 F.Supp. 226, 234 (S.D.N.Y.), *aff'd,* 805 F.2d 391 (2d Cir. 1986). Evidence relating to company-wide practices may reveal patterns of discrimination against a group of employees, increasing the likelihood that an employer's offered explanation for an employment decision regarding a particular individual masks a discriminatory motive. This case turns on the sincerity of American Cyanamid's claim that Hollander's abrasive personality justified his discharge, notwithstanding what Hollander depicts as American Cyanamid's prior fickle attitude towards this dimension of Hollander's job performance and the inability of a company supervisor to detail instances in which such problems impeded productivity. It is possible that Hollander's discovery request might uncover a pattern of older management employees leaving American Cyanamid under unexplained circumstances, which might help prove his claim

that American Cyanamid's explanation for his discharge was pretextual.

Because employers rarely leave a paper trail or "smoking gun -- attesting to a discriminatory intent, *see Ramseur v. Chase Manhattan Bank.* 865 F.2d 460, 464-65 (2d Cir. 1989) (citing cases); *Dister v. Continental Group, Inc.,* 859 F.2d 1108, 1112 (2d Cir. 1988), disparate treatment plaintiffs often must build their cases from pieces of circumstantial evidence which cumulatively undercut the credibility of the various explanations offered by the employer. Such determinations are, generally speaking, most competently made by the trier of fact. So long as the plaintiff can present "solid circumstantial evidence" supporting his case, *see Clements v. County of Nassau,* 835 F.2d 1000, 1005 (2d Cir. 1987), he should have the opportunity to prove his case at trial. The district court's refusal to compel an answer from American Cyanamid deprived Hollander of evidence potentially helpful to his attempt to assemble such a quantum of circumstantial evidence supporting his argument of pretext. Accordingly, we reverse the district court's denial of Hollander's motion to compel and vacate summary judgment on the discrimination discharge claim. *See Cedillo v. International Ass'n. of Bridge & Structural Iron Workers, Local Union No. 1,* 603 F.2d 7, 12 (7th Cir. 1979) (holding summary judgment inappropriate in disparate treatment case when a district court limited plaintiff's ability to discover information relevant to employer's motivation) : *see also Diaz v. American Telephone & Telegraph,* 752 F.2d 1356, 1362-63 (9th Cir. 1985) (holding summary judgment "patently inappropriate" when district court restricts plaintiff's ability to discover evidence necessary to establish disparate treatment prima facie case).

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

Arthur Hollander, : Civ. No. B 85-481 (WWE)

Plaintiff, : **Cite:**

v. : **999 F.Supp. 252, 258-59**

American Cyanamid Company, : **(D. Conn. 1998)**.

Defendant. :

RULING ON PENDING MOTIONS

Plaintiff, Arthur Hollander, brought this action against his former employer, defendant American Cyanamid Company ("Cyanamid") ... asserting claims of age discrimination in violation of the Age Discrimination in Employment Act ("ADEA") , 29 U.S.C. § 621 et. seq., retaliation and tortious interference with a business expectancy. On March 23, 1989, this court granted summary judgment in favor of the defendant as to plaintiff's claim for age discrimination and retaliation. On appeal, the Second Circuit vacated that ruling in part, on the narrow finding that this court erred in not permitting plaintiff to discover information regarding management-level Cyanamid employees who were over the age of 40 when their employment with Cyanamid terminated. The appellate court affirmed this court's conclusion as to plaintiff's retaliation claim, and did not preclude a later finding of summary judgment for defendant once the additional discovery has been completed. Hollander v. American Cyanamid, 895 F.2d 80 (2d Cir. 1990).

a. Plaintiff's Evidence of Pretext

In essence, plaintiff's evidence falls into two categories. First, plaintiff attempts to undercut defendant's articulated non-discriminatory reason for discharging him by adducing evidence which he claims shows that Cyanamid's explanation is unworthy of belief, and therefore, a pretext for discrimination. Plaintiff essentially contends that there is a question of fact as to whether he actually had difficulties with interpersonal relationships, and whether the defendant's critiques of him were part of a plan to discriminate against him because of his age.

In support of his position, plaintiff has compiled affidavits of former co-workers who attest that he was, in fact, quite affable. Additionally, plaintiff presents to the court affidavits which indicate that plaintiff may not have been actually responsible for the alleged "union incident" or for an alleged "safety incident" for which the defendant blamed him. Plaintiff also points to evidence already in the record, such as his overall good track record with Cyanamid which included bonuses, raises, and overall positive reviews.

Plaintiff stresses the fact that Robert Duckett, when asked in his deposition to recount specific events leading to his scathing October, 1983 review of plaintiff, cannot remember a single occurrence. Plaintiff also complains that a good deal of defendant's defense is based on inadmissible hearsay, name-calling, innuendo and reputation evidence. As plaintiff puts it, "defendant does not contend that plaintiff was terminated because he had a bad reputation." Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment at 12.

This court agrees with plaintiff that his evidence may in fact raise some doubt as to whether defendant's articulated reason for discharging him is believable. Certainly, in some

instances.

> The Factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of a prima facie case, suffice to show intentional discrimination.

St. Mary's Honor Center, 509 U.S. at 511 (emphasis added).

In an important Second Circuit en banc decision the appellate court explained, however, that a "finding of pretext, together with the evidence comprising a prima facie finding, is not always sufficient to sustain the ultimate finding of intentional discrimination." Fisher v. Vassar College, 114 F.3d 1332, 1338 (2d Cir. 1997) (en banc) (emphasis added) (hereinafter "Fisher II"); cert. denied, 118 S.Ct. 851 *1998); affirming Fisher v. Vassar College, 70 F,3d 1420, 1437 (2d Cir. 1995) (hereinafter "Fisher I").

In that case, Fisher asserted claims for Title VII and age discrimination after having been denied tenure by her former employer, Vassar College. Fisher attempted to show that Vassar's reason for not granting her tenure was actually a pretext for discrimination. Specifically, Fisher adduced evidence which indicated that her scholarship, teaching, service and leadership were actually better than Vassar had claimed. Fisher II at 1334. She buttressed this assertion with, inter alia, previous favorable reviews, some of which contradicted certain of Vassar's reasons for denying her tenure. Fisher I at 1334-36.

Notwithstanding this evidence, the Second Circuit affirmed en banc a Second Circuit panel decision holding that it was clear error for the fact finder to conclude that Vassar had discriminated against Fisher. Fisher II at 1345. The en

banc majority opinion noted that:

> discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small minded .... In short, the fact that a proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff.

Fisher II at 1337-39. Accordingly, plaintiff may prevail only if he shows that Cyanamid's proffered reasons are a pretext for discrimination, "either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction -- or both." Fisher II at 1339.

The court finds under the circumstances of this case that of the many possible reasons for Cyanamid's inconsistencies, illegal discrimination is no more likely a reason that any other. Moreover, as the court will discuss in Section II.C.4.b. infra, plaintiff cannot point to any other evidence which would support a finding of age discrimination. The court thus finds that although plaintiff's evidence may cast some doubt on defendant's proffered reason, it does not permit the inference that defendant discriminated against plaintiff because of his age. See, Fisher II at 1338.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

August Term 1998

Argued: December 15, 1998 Decided: March 29, 1999

Docket No. 98-7502

Cited: 172 F.3d 192, 200 - 202 (2d Cir. 1999)

ARTHUR HOLLANDER

Plaintiff - Appellant

-- against --

AMERICAN CYANAMID COMPANY,

Defendant - Appellee.

Before: FEINBERG, CALABRESI AND SOTOMAYOR,

Appeal from (1) judgment of the United States District Court for the District of Connecticut, Warren W. Eginton, J., dismissing plaintiff's federal age discrimination claim and (2) related order striking portions of plaintiff's affidavit submitted in support of memorandum in opposition to defendant's motion for summary judgment. Held, (1) stricken portions of plaintiff's affidavit were not based on plaintiff's personal knowledge; contained inadmissible hearsay, made conclusory statements and were properly stricken: and (2) plaintiff's evidence was insufficient to create an inference that defendant discriminated against the plaintiff because of his age, so that summary judgment for the defendant was proper.

Affirmed. Judge Calabresi concurs in the opinion of the court and also files a separate opinion.

3. Hollander's Attempt to Show that he is a Victim of Age Discrimination.

Cyanamid's articulation of a legitimate, non-discriminatory reason brings us to what the district court called "the heart of this case" -- whether Hollander has presented sufficient evidence for a reasonable jury to conclude that Cyanamid discriminated against him because of age. 999 F. Supp. at 257. Hollander put forth two categories of evidence in support of his position. First, he offered evidence to rebut Cyanamid's non-discriminatory reason by raising a question of fact as to whether he actually had interpersonal problems; in other words, Hollander attempted to show that Cyanamid's stated reason for his discharge was pretextual and itself constituted proof of discrimination. Second, he offered statistical evidence from which, he argued, a reasonable jury could infer that Cyanamid discriminated against him because of his age. While the district court found that the evidence submitted by Hollander "may in fact raise some reasonable doubt as to whether [Cyanamid's] articulated reason for discharging him is believable", 999 F.Supp. at 258, it held that no reasonable jury could conclude that, based on the evidence, Hollander was a victim of discrimination. For the reasons stated below, we agree.

a. Hollander's non-statistical evidence

Various items made up the first category of evidence on which Hollander relies. Hollander offered affidavits from former co-workers stating that he was not difficult to work with and may not have been responsible for the alleged unionization incident cited by Cyanamid. Hollander also stressed the fact that, at his depositions in 1986 and 1987, Duckett could not remember a single event that led to the

scathing 1983 review of Hollander in which Duckett wrote that Hollander left a "trail of wreckage" in regard to interpersonal relationships. In addition, Hollander offered letters from employees at Cyanamid -- including Duckett -- complimenting his efforts as Manager of Medical Devices.

> "We need not decide whether Hollander offered enough evidence to establish that Cyanamid used his allegedly poor interpersonal skills as a pretext for its true reason for terminating him. Assuming arguendo that he did, this is far from the end of the matter, for to survive summary judgment Hollander had to show not only pretext, but also either use of a pretext that itself implies a discriminatory stereotype, or use of pretext to hide age discrimination. This, he did not do."

This court was presented with a similar situation in Fisher v. Vassar College, 114 F.3d 1332 (2d Cir. 1997)(en banc) (Fisher III), cert. denied, 118 S. Ct. 851 (1998). In Fisher III, plaintiff, Cynthia Fisher asserted claims of sex and age discrimination after being denied tenure by her former employer, Vassar College. Vassar argued that Fisher was denied tenure because a review that found her scholarship, teaching ability, leadership and service to the college to be deficient. In an attempt to show that Vassar's reason was pretextual, Fisher offered evidence that contradicted certain conclusions of the review. The district court, after a bench trial, concluded in Fisher v. Vassar College, 852 F.Supp. 1193 (S.D.N.Y 1994 (Fisher) that Vassar had discriminated against Fisher on the basis of her sex. A panel of this court, however, reversed the district court. Fisher v. Vassar College, 70 F.3d 1420 (2d Cir. 1995) (Fisher II) . Thereafter, the en banc court in Fisher III reached the same result as the panel did in Fisher II because Fisher's evidence did not show that Vassar's stated

reason for denial of tenure was a pretext for discrimination on the basis of her sex or itself reflected a discriminatory stenotype. Fisher III, 114 F.3d at 1333. The en banc majority opinion stated that a "plaintiff may prevail only if an employer's proffered reasons are shown to be a pretext for discrimination, either because the pretext finding itself points to discrimination or because other evidence in the record points in that direction -- or both." Id. at 1339: see also, Quaratino v. Tiffany & Co., 71 F.3d 58, 64 (2d Cir. 1995) ("An employer's reason for termination cannot be proven to be a pretext for discrimination unless it is shown to be false and that discrimination was the real reason"). While Fisher produced some evidence of pretext, neither the pretext nor the record pointed to the conclusion that Vassar had discriminated against her on the basis of her sex. elaborating, the majority of the en banc court stated in Fisher III that

> "discrimination does not lurk behind every inaccurate statement. Individual decision-makers may intentionally dissemble in order to hide a reason that is non-discriminatory but unbecoming or small minded, such as back-scratching, log-rolling, horse-trading, institutional policies, envy, nepotism, spite, or personal hostility ... In short, the fact that the proffered reason was false does not necessarily mean that the true motive was the illegal one argued by the plaintiff." 114 F. 3d at 1337-38

The district court in this case reached the same conclusion, and we agree with Cyanamid that the court did not commit reversible error in doing so. First, assuming arguendo that Hollander's alleged interpersonal problems were used by Cyanamid as a pretext for the company's true reason for his termination, the pretext in and of itself does not suggest age discrimination. Had Cyanamid claimed that it terminated Hollander because of a characteristic stereotypical associated

with age -- for example, because he was "unable to keep up with the times" -- and had Hollander shown that reason to be pretextual, our conclusion might be different. The perception that Hollander had interpersonal problems - noted almost from the outset of his re-employment by Cyanamid -- does not reflect such stereotypical thinking.

Second, nothing else in the record points to age discrimination as the real reason for Hollander's termination. As we noted in Fisher III, an employer may give a false explanation for terminating an employee in order to mask the true reason which, though petty, spiteful or otherwise ignoble, is not unlawful. Hollander overlooks this statement of law by contending that if Cyanamid's proffered reason is not to be believed, then the true reason for his termination must have been his age. However, Hollander put forth no proof of any age-related remarks or actions toward him by Cyanamid personnel, and admitted that his age was never explicitly raised as a factor in his termination. If reliance on Hollander's alleged interpersonal problems was indeed a pretext -- and we repeat that we are not so holding -- the record before us shows that the stated reason may have been a pretext for various non-discriminatory reasons. This is not a case in which a finder of fact could reasonably conclude that Hollander's termination was, more probable than not, due to age discrimination because no other, non- discriminatory explanation was possible. The district court concluded that "of the many possible reasons for Cyanamid's inconsistencies, illegal discrimination is no more likely a reason than any other." Hollander, 999 F. Supp. at 259. We agree. Therefore, it was not error for the district court to hold that this evidence did not permit the inference that Cyanamid discriminated against Hollander because of his age.

29 U.S.C. SECT. 623, Prohibition of Age Discrimination

(a)Employer practices: It shall be unlawful for an employer:

(1) To fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age.

(2) To limit segregate, or clarify his employees in any was which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's age: or,

(3) To reduce the wage rate of any employee in order to comply with this chapter

SUPREME COURT RULE 10.1 (c)

.1 A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

FRCP - Rule 56 (c) - Summary Judgment

(c) Motion and Proceedings Thereon, The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of the hearing may serve opposing affidavit. The judgment sought shall be

interrogatories, and admissions on file, together with the affidavits, if ant show that there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

FRCP - Rule 60 (b) - Relief From Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms, as are just, the court may relieve a party ... from a final judgment, or order, or proceeding fir the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentations, or other misconduct of an adverse party; (4) the judgment is void; **(5)** the judgment has been satisfied, released, or discharged, or a prior judgment on which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time.....

FRE - Rule 702 - Testimony by Experts

If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education. may testify thereto in the form of an opinion or otherwise.